

State Personnel Board, State of Colorado

Case No. 99 B 020

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JUANITA B. CRANE,

Complainant,

v.

DEPARTMENT OF HIGHER EDUCATION,
BOARD OF TRUSTEES OF THE COLORADO SCHOOL OF MINES,
COLORADO SCHOOL OF MINES,

Respondent.

This matter was commenced on December 17, 1998 and a status conference convened at the request of the parties. The matter was continued to, and hearing held, January 29, 1999 and February 1, 1999 before Administrative Law Judge G. Charles Robertson at State Personnel Board Hearing Room, B-65, 1525 Sherman Street, Denver, CO 80203.

MATTER APPEALED

Complainant appeals the disciplinary termination imposed by Respondent and claims that Respondent discriminated against Complainant, based on disability, in imposing discipline. In this matter, based on the record of evidence, Respondent did not act in an arbitrary or capricious manner, nor did it act contrary to rule or law. Additionally, Complainant failed to make a *prima facie* case of discrimination based on disability.

The actions of the Respondent are upheld.

PRELIMINARY MATTERS

Respondent, Department of Higher Education, Board of Trustees of the Colorado School of Mines, Colorado School of Mines ("Respondent" or "CSM"), was represented by Susan J. Trout, Assistant Attorney General, 1525 Sherman Street, 5th Floor, Denver, CO 80203.

Complainant, Juanita B. Crane (“Complainant”), was represented *pro se*.

1. Procedural History

Complainant filed her Notice of Appeal in this matter on August 17, 1998. Complainant appealed her termination of employment with Respondent. Complainant claims the actions of CSM were arbitrary, capricious, and/or contrary to rule or law. In addition, Complainant claims the action of the appointing authority was discriminatory, based on disability. The matter was referred to the Colorado Civil Rights Division for investigation. Subsequently, on November 9, 1998, Complainant was deemed to have waived an investigation of the discrimination claim for failure to file a verification of commencement of investigation, and for failing to respond to an Order to Show Cause as to why such a verification was not filed.

Hearing on this matter was commenced on December 17, 1998. The matter was continued and the evidentiary hearing was held January 29, 1999 and February 1, 1999. The evidentiary portion of the hearing lasted two days. Given that Complainant was represented *pro se*, a detailed description of the hearing process was provided to Complainant.

2. Complainant’s Request Not to Testify at Hearing

On January 27, 1999, Complainant filed a written request not to testify at hearing. In said request, Complainant stated that she did not wish to testify given that she had been unable to retain counsel. At the time of hearing, Complainant was advised that she had filed a prehearing statement in which she only listed one witness and Complainant had indicated that the witness would not be available to testify. After being advised of the hearing procedure, and that consequences could occur as a result of her failing to testify, Complainant withdrew her request and fully participated in the hearing.

3. Witnesses

Respondent called the following witnesses during its case-in-chief: (1) Complainant, (2) Cathy Leyva, Administrative Program Specialist, Planning and Construction Division, Colorado School of Mines, 1500 Illinois, Golden, CO 80401; (3) Timothy Cake, Director Plant Facilities, Colorado School of Mines, 1500 Illinois, Golden, CO 80401; (4) Robert G. Moore, Vice President of Business Affairs, Colorado School of Mines, 1500 Illinois, Golden, CO 80401; and Debby Page Lane, Human Resource Director, Colorado School of Mines, 1500 Illinois, Golden, CO 80401. Some witnesses were taken out of order so as to accommodate the witnesses’ schedules.

On rebuttal, Respondent called the following witnesses: (1) Debby Page Lane; and (2) Cathy Leyva.

Complainant called the following witnesses during its case-in chief : (1) Complainant. (Complainant had listed an additional witness in her prehearing statement. At the time of hearing, Complainant specifically indicated that the identified witness would not be available for hearing.)

5. Exhibits

The following Respondent's exhibits were admitted into evidence:

<u>Exhibit #</u>	<u>Type of Exhibit</u>	<u>Objections Raised</u>
Exhibit 6	Memorandum from Robert Moore to Complainant 12/8/97	No objection
Exhibit 8	Memorandum from Complainant to Tim Cake 1/5/98	No objection
Exhibit 14	Correspondence from Gerhard to Tim Cake 2/6/98	No objection
Exhibit 19	Correspondence from Moore to Complainant 8/5/98	No objection
Exhibit 20	Performance Documentation	No objection
Exhibit 21	Written Instructions Summary C.R.E. 1006	No objection
Exhibit 22	Misidentification Summary C.R.E. 1006	No objection
Exhibit 24	Newspaper article	No objection

No other exhibits were offered by Respondent.

The following Complainant's exhibits were admitted, by way of stipulation, between the parties:

<u>Exhibit #</u>	<u>Description</u>
Exhibit A	Grievance Letter
Exhibit B	Sick Leave Request
Exhibit C	PACE Form 7/8/97
Exhibit D	Memorandum from T. Cake

Exhibit E	7/8/97 Memo from Paul M. Leef
Exhibit F	11/14/97 Memo to Paul M. Leef
Exhibit G	11/4/97 Corrective Action
Exhibit H	11/18/97 Work Plan from Leyva
Exhibit I	11/20/97 Letter from C. Gerhardt to T. Cake
	1/8/98

No other exhibits were offered by Complainant.

ISSUES

1. Whether the Complainant engaged in the actions for which discipline was imposed;
2. Whether the disciplinary termination was within the range of reasonable alternatives available to the appointing authority;
3. Whether the actions of the appointing authority constituted discrimination based on disability; and
4. Whether the actions of appointing authority were arbitrary, capricious, or contrary to rule or law.

FINDINGS OF FACT

I. Background

1. Complainant began her employment with Respondent on about January 1997. Initially, Complainant worked in the main office of Plant Facilities at CSM.
2. Complainant occasionally wears a hearing aid on her right ear as a corrective device for impaired hearing. She does not wear the hearing aid all of the time. For instance, she does not wear the hearing aid while she drives an automobile. She does not wear the hearing aid at home. At the commencement of this hearing, Complainant failed to wear a hearing aid and could not recall as to why she failed to wear the device. The hearing aid was designed in such a way as to

be easily removable. At her discretion, Complainant could remove her hearing aid.

3. Complainant was under the impression that in the event she misplaced or damaged her hearing aid, *she would have to see a "state doctor"* to have the hearing aid replaced or repaired. Prior to working at CSM, Complainant lost the hearing aid in November 1996 and then found it in the early part of 1997.
4. Complainant did not have regular hearing tests. She would only visit an audiologist if she was experiencing some problem with her hearing aid. Complainant testified that she had not seen an audiologist, except as described below, for several years.
5. At the time of hire, Respondent was not aware that Complainant wore a hearing aid.
6. Complainant further testified that she also was hearing impaired in her left ear.
7. At the time of hire, Complainant was supervised by Alicia Tolwinski.
8. Tolwinski reported to Timothy Cake, Director of Life/Plant Facilities at CSM. Cake had responsibilities over the last 17 years involving budget, personnel management, and maintaining the campus. Cake also had supervisory authority over Cathy Leyva, an administrative program specialist in the Planning and Construction division of Life Facilities at CSM. Cake reported to Robert Moore, the appointing authority.

II. Incidents Giving Rise to Discipline.

9. While working for Tolwinski in March 1997, Crane lost her hearing aid. It took approximately 3 months for Crane to replace the hearing aid.
10. During the same period, Crane experienced problems with her interpersonal relationships at work. Tolwinski and the Human Resource Director of CSM, Debby Lane met to discuss the issues. No action was taken at that time with regard to Complainant's performance. (Exhibit B).
11. On July 2, 1997, Cake issued a memorandum to Complainant regarding a sick leave request. The memo was issued as a result of Complainant having abused sick leave. Complainant had called in sick and provided one explanation, then subsequently called in and provided another explanation for her absence. The memorandum merely outlined the need for Complainant to provide a medical

release form in the event of illness. Lane and Tolwinski were sent a copy of the memo.

12. On July 8, 1997, Complainant received at PACE performance evaluation rating of Good, scoring 321.5 points. The rating was completed by Tolwinski. (Exhibit C). The evaluation stated that Complainant's strengths included commendable typing and word processing and that she was "very good" in written communications. The evaluation also listed as an area of development the need to improve general communications and personal relations.
13. On July 8, 1997, Cake issued a memorandum to Complainant in which he identified three issues which needed to be addressed: Trust, Honesty, and Respect. In the memo, Cake specifically stated that hearing was:

. . . an integral part of the success of this process is one's ability to communicate effectively. In order to do this one must be able to hear the other. In the position you have, it is imperative that you have effective hearing. *Now that you have your hearing aid*, we will expect that you will be able to effectively hear other office members such that they will not have to raise their voice to you, thus eliminating the discomfort of appearing to be "yelling" at Anita. This will also resolve our problem with your inability to hear the phones, thus enabling you to improve your answering skills. (emphasis added).

The memorandum also indicated that if Complainant was having any issues or problems hearing individuals or individuals on the telephone, she was to inform her supervisor immediately. (Exhibit D).

14. On August 26, 1997, Complainant was transferred to the Planning and Construction division. Initially, the transfer was to be temporary in order to provide support for the office. She retained the same level of classification. (Exhibit G). She reported to Cathy Leyva.
15. At the time of transfer, Crane's responsibilities in the new position included: answering the phone, calendaring appointments and scheduling conference rooms, reviewing all incoming documents, maintaining logs of incoming and outgoing documents, maintaining an accurate filing system of the various documents, and being in attendance because of the small office. At that time, an extra telephone was installed in the copy room to allow Complainant to be away from her desk during copying. Complainant also brought a telephone from the main office which had an amplification device. Finally, Complainant was permitted to re-

arrange her desk in such a way as to allow her to better “hear” individuals.

16. The Planning and Construction division was responsible for the oversight of administration of construction projects facilitated by CSM. The office was responsible for administering contracts, budget, accounting and all other matters related to construction at CSM. A number of projects were ongoing during any particular year. The value of such projects could exceed 20 million dollars. In a majority of matters, time was of the essence with such projects. This was a result of having to ensure that CSM complies with all fiscal deadlines, and project deadlines, associated with the construction. Inaccuracies in filing could cause deadlines to be missed, unapproved construction to occur, and the misuse of materials not approved for use resulting in exceeded construction budgets.
17. The general working environment at Planning and Construction could not be characterized as positive. On at least one occasion, Complainant and staff of the office engaged in yelling at one another over silly disputes such as scheduling of conference rooms. In addition, the atmosphere harbored concerns about eavesdropping and the use of employees’ computer equipment by Complainant.
18. Despite the working environment, during the months of September, October and November 1997, Complainant was involved with various performance problems. For example:

Performance Issue

Exhibit

Improper distribution of Utility Outage Notification	Ex. 20-1
Inability to locate documents on computer (created by Leyva)	Ex. 20-4
Improper distribution of documents; misidentification of documents; mis-filing.	Exs. 20-6; 20-17; 20-36

Additional performance issues related to: attendance; failure to appropriately file documents, causing miscommunication in the construction requirements; failure to transmit documents, or portions of documents, so that the necessary recipients would have the requisite information to continue with construction projects; and failure to adequately log incoming documents so as to allow individuals involved in the administration of the construction projects to locate specifications. (Exhibits 20 and 22).¹

19. In early November, Complainant received a memorandum from Paul M. Leek,

¹ Exhibit 20 contains a range of documents labeled 20-1 through 20-708, representing various performance issues and documentation regarding use of sick leave, inter-relations with co-workers, performance etc. Exhibit 22 is a summary/compilation of the Exhibit 20 and entered into evidence under the criteria of C.R.E. 1006.

Leyva's supervisor, citing performance problems. The memorandum acknowledged the role of the Planning and Construction division and the value of construction projects. It outlined failures in Crane's performance including the need to accurately and timely complete construction specification requests of co-workers. Cake and Leyva were sent a copy of the memorandum. (Exhibit E). The memo also cited what was perceived as Crane's less than appropriate telephone mannerisms.

20. Complainant responded to the memorandum with explanations for her performance which noted the fact that her transfer to the division was temporary and that because of the nature of the division, one had to account for a learning curve in the field of construction. Complainant also admitted to having problems with the computer files and in setting up portions of word processing documents. Complainant also noted that because of her "hearing," she was very conscious of her telephone mannerisms and felt that people often misconstrued her mannerisms as a result of her compensation for her hearing loss.
21. On November 18, 1997, Cake issued a corrective action to Crane. (Exhibit G). In said corrective action, Crane was reminded of the need to comply with procedures involving sick leave. The corrective action also outlined that performance problems included her inability to follow instructions, computer filing, inaccuracy of project filing, inaccuracies in transmittal log entries, the improper issuing of utility outage memos, communications, and repeated word processing and specification production errors. The corrective action required Complainant to: improve communication skills; follow instructions from Leyva; reduce errors in production of documents; and maintain accurate accounts for assigned budgets, transmittal logs and project files. The corrective action required Complainant to meet its expectations from November 18, 1997 to February 18, 1998.
22. In conjunction with the corrective action, Leyva developed a VERY specific work plan and provided it to Crane. The plan provided for each specific task of Complainant's, whether or not an explanation period for each task needed to occur, whether there should be a minimal instruction period for each task, and whether or not Crane could already complete such tasks independently. In addition, a comment section was provided allowing Complainant to add comments to the plan. Complainant signed the work plan.
23. Leyva believed this level of detail in the plan would provide strict and specific guidance to Complainant in redressing the performance issues. The plan acknowledged that there were expectations that could not be immediately met by Crane but also allowed for a learning period of time and instruction. Leyva believed that over the course of 3 months, the plan would allow Complainant to

learn the particular aspects of the Planning and Construction office and matters associated with construction. The plan also documented that Crane was to generate a notebook/manual of procedures as she worked through the corrective action and plan. (Exhibit H; Exhibit 20-120, 20-127). The manual was to be a compilation of instructive memos provided by Leyva during the course of the corrective action. The goal was to create a reference tool for Complainant as she completed the work plan. (Exhibit 21).

24. Complainant filed a grievance of the corrective action. The grievance asked that: all negative data from Crane's personnel file be removed, including Needs Improvement ratings for some of the factors (not the overall evaluation); a work plan be developed which was fair; and Complainant be allowed to work in an atmosphere where her hearing is not used as an evaluation factor.
25. On December 8, 1997, Robert G. Moore issued a final action with regard to the grievance. (Exhibit 6). He indicated that after reviewing information submitted to him, he believed the ratings were appropriate, that the work plan previously developed was fair, and that Complainant's ability to hear had not been used inappropriately as an evaluation factor. Moore outlined how Crane had failed to wear a hearing aid for months in the spring of 1997, and noted that Crane had been instructed earlier in 1997 to advise her supervisors if any issues involving her hearing were impacting her performance and that she had failed to do so. Moore also noted that Crane's failure to wear a hearing aid for months at a time may have reduced her ability to properly perform her job. Finally, Moore indicated that the corrective action did not reflect any inappropriate action based on her ability to hear.
26. Complainant acknowledged that the work plan was designed to help her improve her work performance. (Exhibit 20-142). Complainant did not petition the State Personnel Board for a hearing of the appointing authority's final grievance decision.
27. Performance problems continued to occur during the months of December 1997 and January 1998, including improper maintenance of files, mis-filing of submittal papers and improper maintenance of the document logs. (Exhibit 22). On more than one occasion, the work plan was reviewed and Leyva and Crane would re-assess various tasks and the time needed to learn/master such tasks. Crane would sign revised versions of the work plan. (i.e. Exhibits 20-149, 20-155, 20-157).
28. During the same period of time, Complainant would at times fail to wear her hearing aid. (Exhibit 20-151).

29. At some point during this time, Cake requested that Complainant submit a hearing report to Respondent in order to evaluate the extent of Complainant's hearing impairment.
30. Crane subsequently filed a hearing report of an audiologist on January 5, 1998. The report was one page of technical schematics regarding Crane's hearing range. The report contained a scientific description of Crane's hearing capacity.² In the same memorandum, *Complainant complained about having to wear a hearing aid and having to inform her supervisors when she was without it.*
31. On February 6, 1998, a subsequent report from Christine Gerhardt, MA-CCC-A, of the Family Hearing Center was submitted to Cake. The report outlined that Complainant has a moderate to severe hearing loss in both ears. It described that difficult hearing situations for Complainant include: soft-spoken or unclear speakers, speakers with an accent, noisy environments, environments with competing noise, and distance or physical barriers to sound transmission. The report further stated that hearing aids in this type of situation are limited in their usefulness. It was recommended that Crane only wear one hearing aid, that she have a phone amplification device, and that she may still have some difficulties in hearing around walls, barriers, etc. (Exhibit 14).
32. Gerhardt's report stated that with the use of amplification, Complainant could be expected to perform the duties of her present job with minor accommodations. A list of such accommodations was attached to the report and included: the need to address the person by name, contemplation as to how sound travels, consideration of distance from the listener, the surfaces around a speaker, the need to minimize background noise, and providing visual clues.
33. The deadline on the corrective action was February 1998. The work plan associated with the corrective action was completed in March 1998. (Exhibit 20-324). It was noted at that time that Crane was still having problems meeting components of the work plan including basic understanding of progression of construction projects; learning the filing system; the mis-filing of documents; and failure to provide proper reception of individuals. Crane signed the plan/evaluation. The only initial comment Crane provided was that some work was not accomplished as a result of being on funeral leave. Subsequently, Crane took issue with the plan and the level of completeness. (Exhibit 20-342).
34. Complainant failed to wear a hearing aid on March 6, 1998.

² No evidence was offered by Complainant or Respondent as to an interpretation of the report.

35. Complainant had been directed as to when to take her lunch break and failed to resolve any conflicts associated with taking a lunch break. (Ex. 20-318, 319).
36. CSM completed a Corrective Action Results Memo on April 10, 1998. (Exhibit 20-377). In the results, it was noted Crane improved her attendance. It provided a 2-step analysis of the corrective action period. Respondent's results rated Complainant as overall Needs Improvement. A new PACE was put into affect. (Exhibit 20-382). Complainant failed to agree to the plan.
37. On June 30, 1998, the evaluation was completed under the new PACE. Complainant was rated at Needs Improvement. (Exhibit 20-591). Complainant disagreed with the evaluation but did not file a grievance. Respondent documented a number of performance issues in support of the rating. (Exhibit 20, Exhibit 22). Complainant offered little or no evidence in rebuttal to the documentation.
38. The following performance problems were identified:
- Failure to exhibit professionalism and technical knowledge;
 - Problems in prioritizing potential and real problems;
 - Needing to be reminded of procedures and policies despite having completed work plan;
 - Failure to maintain working relationships;
 - Failure to correctly mark and file documents; and
 - Failure to keep accurate logs of submittals.
- (Exhibit 20-591).
39. Complainant asked for 2 weeks to provide comments on the evaluation. (Exhibit 20-600).
40. Cake requested Robert Moore to take disciplinary action on or about July 21, 1998.
41. Performance problems continued to occur throughout July 1998 including at least three instances of mis-filing of Requests for Information on particular projects, improper distribution of documentation, and the misplacement of documents. (Exhibit 22).
42. On July 31, 1998, an R8-3-3 meeting was held pursuant to Board rule. (Exhibit

19). Complainant did not wear her hearing aid to the meeting. When asked as to whether or not she would like a postponement of the meeting in order to retrieve her hearing aid, Complainant said no.

43. The PACE evaluation June 30, 1998 was thorough, fair, and provided an accurate rating of Needs Improvement. Moore noted that Complainant had been warned a number of times regarding her performance. He noted that Complainant did not provide any information that would mitigate her rating or would explain her job performance. (Exhibit 19). As a result of these findings, Respondent terminated Complainant's employment.

44. At the time discipline was imposed, Board Policy 11-1, 4 CCR 801-1, provided in part:

Discrimination for or against any person is prohibited, except for bona fide occupational reasons, in . . . assignment of duties, . . . or any other personnel action because of . . . being a person with a disability where accommodation can reasonably be made or who does not require any accommodation, . . .

45. Board Rule 11-1-4, 4 CCR 801-1, provided in part:

All employing agencies in the State Personnel System shall make reasonable accommodation to the known physical or mental limitations of a qualified applicant or employee who has a disability. . .

(A) Accommodation may include (1) making facilities used by employee readily accessible to and usable by persons with a disability; (2) job restructuring, part-time or modified work schedules; (3) acquisition or modification of equipment or devices; (4) relocation of particular offices or jobsites so that they are in facilities or parts of facilities accessible to, and usable by persons with a disability; . . . (6) and other similar actions.

. . .

(D)(2) Person with a Disability: Any person who (a) has a physical or mental impairment which substantially limits one or more major life activities, (b) has a record of such an impairment, or (c) is regarded as having such an impairment.

. . .

(3) Physical Impairment: Any physiological disorder or condition . . . affecting one or more of the following body systems: . . . special sense organs, . . .

including speech organs.

...

(5) Major life activities: Functions such as . . . hearing. . . .

DISCUSSION

I. INTRODUCTION

Certified state employees have a property interest in their positions and may only be terminated for just cause. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rules R8-3-3 (C) and generally includes: (1) failure to comply with standards of efficient service or competence; (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment; (3) willful failure or inability to perform duties assigned; and (4) final conviction of a felony or any other offense involving moral turpitude.

In this disciplinary action of a certified state employee, the burden of proof is on the terminating authority, not the employee, to show by a preponderance of the evidence that the acts or omissions upon which discipline was based occurred and just cause existed so as to impose discipline. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994).

In *Charnes v. Lobato*, 743 P.2d 27, 32 (Colo. 1987), the Supreme Court of Colorado held that:

Where conflicting testimony is presented in an administrative hearing, the credibility of witnesses and the weight to be given their testimony are decisions within the province of the agency.

In determining credibility of witnesses and evidence, an administrative law judge can consider a number of factors including: the opportunity and capacity of a witness to observe the act or event, the character of the witness, prior inconsistent statements of a witness, bias or its absence, consistency with or contradiction of other evidence, inherent improbability, and demeanor of witnesses. Colorado Jury Instruction 3:16 addresses credibility and charges the fact finder with taking into consideration the following factors in measuring credibility:

1. A witness' means of knowledge;
2. A witness' strength of memory;
3. A witness' opportunity for observation;
4. The reasonableness or unreasonableness of a witness' testimony;

5. A witness' motives, if any;
6. Any contradiction in testimony or evidence;
7. A witness' bias, prejudice or interest, if any;
8. A witness' demeanor during testimony;
9. All other facts and circumstance shown by the evidence which affect the credibility of a witness.

II. PARTIES' ARGUMENTS

Respondent argues that this is a disciplinary action is not arbitrary, capricious, or contrary to rule or law. It maintains that the action was not discriminatory in nature and that Complainant was not subject to discrimination of any kind based on any disability. Respondent maintains that Complainant failed to meet the performance standards of her job including: inaccurate filing, failure to read correspondence and correctly forward it to the addressees; failure to appropriately identify documents for disposition; failure to understand the filing system; failure to timely complete word processing tasks; and failure to maintain logs of documentation. Additionally, Respondent argues Complainant's performance was weak regarding attendance and scheduling of office lunch hours. Respondent maintains that not all of these performance issues are related to Complainant's hearing impairment. Respondent maintains that it is because Complainant failed to wear her hearing aid that caused some of the performance issues. Respondent believes that Complainant manipulates when and where she wears her hearing aid. Moreover, Respondent argues that during the period of the corrective action, despite a detailed work plan, Complainant failed to make progress. Such is reflected in the performance evaluations during that time period. Finally, Respondent contends that the evidence clearly demonstrates that the appointing authority complied with all board rules in noticing and administering discipline.

Complainant argues that the actions of Respondent are discriminatory based upon a "disability." She maintains that Respondent began discriminating against her in measuring her performance soon after her transfer to the Planning and Construction office. She insists that the loss of her hearing aid during her employment caused her to be without the hearing aid for months. She appears to state that during such periods of time, she should be somehow "accommodated." Complainant believes that the disciplinary actions at issue in this matter, as well as the previous corrective actions and performance ratings, are the result of personality conflicts with Leyva and by discrimination by Cake. She believes she was not given ample opportunity to improve any perceived performance issues. She feels that her requests for support and assistance/training were ignored. Complainant further argues that as a result of her lack of hearing, she was treated differently in evaluations of her performance.

III.

The findings of fact and the preponderance of evidence support Respondent's actions.

I. Discrimination

Given the claim of discrimination based upon her disability, Complainant is charged with making a *prima facie* case for discrimination. As held in *Colorado Civil Rights Commission v. Big O Tires*, 940 P.2d 397 (Colo. 1997), a framework for analyzing claims of employment discrimination exists:

[T]he complainant must establish a prima facie case of discrimination by showing: (i) that the complainant belongs to a protected class; (ii) that the complainant was qualified for the job at issue; (iii) that the complainant suffered an adverse employment decision; . . . and (iv) that the circumstance gave rise to an inference of unlawful discrimination.

Once a complainant establishes a prima facie case, the burden of production shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employment decision. Subsequently, an employee must then show that the employment decision was a pretext for discrimination.

In the past, the Board has relied upon federal interpretations of the American with Disabilities Act, 42 U.S.C. 12101 *et seq.*, for guidance in the implementation of its rules with regard to disability and discrimination. In Sutton v. United Airlines, Inc. 130 F.3d 893 (10th Cir. (Colo.) 1997), the court reviewed the concept of an individual determined to have an impairment using corrective devices to mitigate the impairment. The case involved airline pilots' uncorrected vision and whether or not such was a physical impairment within the meaning of the ADA and whether such an impairment substantially limited a major life activity given that corrective measures were utilized by the pilots' to correct their vision. The court concluded that the pilots' corrected vision, through the use of eye glasses, did not substantially limit their major life activity of seeing. While this holding departs from the Equal Employment Opportunity Commission's Interpretive Guidelines, the 10th Circuit court joins a number of other jurisdictions in this interpretation of the ADA.

In this case, it is clear that Complainant's hearing is impaired. In fact, there is little dispute as to this fact. Such an impairment implicates a major life activity: the ability to hear. However, it is also clear that such an impairment does not substantially impact a major life activity should consideration of mitigating or corrective measures as utilized by the Complainant be taken into account. Complainant occasionally wears a hearing aid. A hearing aid is a device which is meant to correct, or at least improve, an individual's impaired hearing. In this instance, the evidence demonstrates that Complainant wears a hearing aid at her discretion. She chooses

when and when not to wear such a corrective device. The evidence demonstrates that in some of her daily activities, she chooses not to wear a hearing aid. As stated in *Sutton*, “[t]he determination of whether an individual has a disability is not necessarily based on the name of diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.” *Sutton* at 902. Complainant has not met her burden to show that her impairment has a substantial impact on her ability to hear. Thus, Complainant fails to demonstrate she is in a protected class, causing her to fail to meet an element of the *prima facie* case of discrimination. Such a conclusion is reinforced by Complainant’s audiologist’s report indicating clearly that with the use of the corrective device, Complainant should be able to complete her job duties. Thus, with the corrective device, Complainant is not considered disabled.

Even if Complainant is characterized as disabled as a result of the hearing impairment, she did not suffer discrimination. Assuming the disability, Complainant does meet the threshold test of a *prima facie* case of discrimination. She was qualified for her job as an administrative assistant II. She had retained such a position since 1997. In addition, she suffered an adverse employment action, her termination. Finally, an implication can be made that circumstances gave rise to an inference of unlawful discrimination. The issues which led to her termination began primarily when she transferred positions, having previously received a “good” PACE evaluation and then a separate memo with regard to her hearing on the same day.

However, it is apparent that the employer has sufficiently articulated a legitimate, nondiscriminatory reason for the employment decision: poor performance. With the assumption that Complainant had a disability, it is clear that Respondent had notice of the disability. The record supports the fact that Complainant had provided notice to Respondent that she had a hearing impairment and could be considered disabled. This is reinforced by the fact that upon the transfer of Complainant to the Planning and Construction office, Complainant was able to bring her own telephone from the old main office which had an amplification device. In addition, the reason Respondent installed an additional phone to assist Complainant was to enable Complainant to hear incoming telephone calls while away from her desk. Additionally, there is no dispute that Complainant was allowed to rotate the position of her desk so as to facilitate improved hearing and response to individuals. Each of these actions demonstrates Respondent was aware of Complainant’s impairment. Admissions made by Cake and Moore further show that Respondent had notice of Complainant’s impairment as early as July, 1997. Cake’s memorandum of July 8, 1997 acknowledges that Complainant had a hearing impairment (albeit it does not state that such impairment is being considered a disability). Moore was aware of the impairment during his resolution of the grievance in December 1997.

If such an impairment is to be defined as a disability, then it must also be concluded that while Respondent was aware of the circumstance, Respondent also accommodated Complainant under Board rule. The fact that a telephonic amplification device was utilized shows that Respondent was attempting to accommodate Complainant with her job duties, in part, using the

telephone. The installation of an additional telephone reinforces this fact. The re-orientation of Complainant's desk as stated by both parties was done in order to assist Complainant in hearing approaching personnel. Finally, notice was given to Complainant that if she was still having issues with her hearing and her job responsibilities she was to notify her supervisor. No such issues were raised. Respondent's accommodations can only be interpreted as being sufficient.

Thus, if Complainant is characterized as having a disability, and with the fact that Complainant received accommodations with regard to the disability and asked for no additional accommodations, the evidence reflects that Complainant's performance nevertheless remained poor. The evidence shows that Complainant's performance declined after her transfer to the Planning and Construction office. Respondent's demonstration of Complainant's poor performance is emphasized when one looks at the nature of the poor performance and the multitude of evidence illuminating such issues. On balance, Complainant was not disciplined for actions which involved her hearing, rather her performance was primarily measured regarding non-hearing related activities: filing, word processing, scheduling of appointments, failure to review documents, and failure to keep relatively current logs of documentation. Respondent demonstrates by a preponderance of evidence that even if Complainant is characterized as disabled, reasonable accommodations were provided to Complainant and Complainant's performance was such that Respondent had a nondiscriminatory intent for the termination. Therefore, Respondent successfully rebuts any *prima facie* case of Complainant.

II. Arbitrary, Capricious or Contrary to Rule or Law

Incorporating the analysis above, Respondent successfully argues that its actions were not arbitrary, capricious, or contrary to rule or law. Respondent identified the performance problems and utilized the tools available through the personnel system in an attempt to improve Complainant's performance. For instance, Respondent provided Complainant with memorandum raising performance concerns vis-à-vis absenteeism and her interaction with other individuals. Such memos originated from Cake and Leek expressing performance concerns. Next, a corrective action was issued. With the corrective action, an extremely detailed and comprehensive work plan was issued in order to guide and provide notice to Complainant of performance issues. Respondent provided comprehensive counseling and review of the work plan, through Leyva, so as to provide Complainant with an opportunity to improve her performance. Complainant failed to do so. Respondent did not take its actions rashly, or in haste.

Upon completion of the work plan time period, Respondent fairly concluded that Complainant had failed to improve her performance. As an appropriate alternative, Respondent took the next disciplinary step, convened an R8-3-3 meeting, and gathered information. Complainant provided no information that would mitigate or provide explanation for her failing performance. In essence, the appointing authority found that Complainant's performance failed to comply with standards of efficient service and/or competence. Given that progressive discipline had been attempted, through performance evaluations and a corrective action with

work plan, the appointing authority was able to conclude the termination was a reasonable step in imposing discipline.

CONCLUSIONS OF LAW

1. The Complainant engaged in the actions for which discipline was imposed.
2. Disciplinary termination was within the range of reasonable alternatives available to the appointing authority.
3. Respondent's actions were not discriminatory based on disability.
4. The actions of the appointing authority were not arbitrary, capricious, or contrary to rule or law.

ORDER

The disciplinary action of Respondent is UPHELD.

Dated this 18th day
of March, 1999
at Denver, Colorado

G. Charles Robertson
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **\$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record should contact the State Personnel Board office at 866-3244 for information and assistance. To be certified as part of the record on appeal, an original transcript must be prepared by a disinterested recognized transcriber and filed with the Board within 45 days of the date of the notice of appeal.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 2

inch by 11 inch paper only. Rule R10-10-5, 4 CCR 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 CCR 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

CERTIFICATE OF MAILING

This is to certify that on this _____th day of March, 1999, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Juanita B. Crane
381 South Jefferson Ave.
Louisville, CO 80027

and in the interagency mail, addressed as follows:

Susan J. Trout
Assistant Attorney General
1525 Sherman Street, 5th Floor
Denver, CO 80203
